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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

WRS, INC. d/b/a WRS MOTION PICTURE LABORATORIES, a corporation, Plaintiff,	)	
vs.	)	C.A. No. 00-2041 Judge William L. Standish
PLAZA ENTERTAINMENT, INC., a corporation, ERIC PARKINSON, an individual, CHARLES von BERNUTH, an individual and JOHN HERKLOTZ, an individual, Defendants	)	

BRIEF OF PLAINTIFF WRS, INC. IN SUPPORT OF ITS MOTION TO REOPEN THE CASE

AND NOW, comes WRS, Inc., d/b/a WRS Motion Picture Laboratories, a corporation, by its counsel, Thomas E. Reilly, Esquire, with the following Brief in Support of its Motion to Reopen the case.

STATEMENT OF THE CASE AND FACTS

Plaintiff, WRS, Inc. (hereinafter referred to as "WRS") commenced this diversity action in the District Court on October 13, 2000. In its Complaint WRS sought money damages, declaratory relief and foreclosure of its claimed security interests. Defendants, Von Bernuth, Parkinson and

EXHIBIT
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Herklotz, eventually answered the WRS Complaint. Defendant Plaza Entertainment, Inc. filed a Counterclaim against WRS.

In July of 2001, the National Bank of Canada, (Hereinafter "NBOC") the secured creditor of WRS instituted and involuntary receivership proceeding against WRS in the United State District Court for the Western District of Pennsylvania. On August 24, 2001, WRS commenced a voluntary Chapter 11 Bankruptcy proceeding in the United States Bankruptcy Court for the Western District of Pennsylvania. Because Thomas E. Reilly as counsel of record in these proceedings is a creditor of WRS, the commencement of the WRS bankruptcy created a conflict of interest between Thomas E. Reilly and WRS. Under 11 U.S.C. §327, an attorney that has represented a Chapter 11 debtor pre-petition, who is also a creditor, may be appointed as special counsel to continue the representation during the case. During the first few months of the WRS Chapter 11, bankruptcy counsel negotiated with Thomas E. Reilly about continuing for WRS in the within case and several other cases in which WRS was attempting to recover accounts receivable. However, in part because all receivables, including the Plaza receivable, which is the basis of this action, were encumbered to the NBOC as WRS secured lender, Thomas E. Reilly was unwilling to continue with the case on a contingent fee basis as proposed.

On December 13, 2001, Thomas E. Reilly, Esquire and Thomas E. Reilly, P.C. filed a Motion to Withdraw as Counsel for WRS in the within case. The reason for the withdrawal was that pursuant to 11 U.S.C. § 327, WRS, as a Chapter 11 Debtor, must have Court approval to hire professionals, including attorneys. As of December 13, 2001, the Bankruptcy Court had not approved Thomas E. Reilly, P.C. to continue to represent WRS.

Following the filing of the Motion to Withdraw as Counsel the Court conducted two case management conferences one on January 8, 2002 and another on February 13, 2002. Because Thomas E. Reilly, Esquire and Thomas E. Reilly, P.C. had not been approved to act as counsel for WRS as of February 13, 2002, the Court granted Thomas E. Reilly, Esquire and Thomas E. Reilly, P.C. leave to withdraw and entered the following Order on February 14, 2002:

1. Plaintiff WRS, Inc. d/b/a/ WRS Motion Picture Laboratories , is in bankruptcy and is not represented by counsel in the above-captioned action. It appears that no further action may be taken by the court at this time. The Clerk shall accordingly mark the above captioned case as closed. Nothing contained in this order shall be considered a dismissal or disposition of this action, and should further proceedings therein become necessary or desirable, any party may initiate the same in the same manner as if this order had not been entered.

2. In the event that counsel does not enter an appearance for Plaintiff on or before March 15, 2002, the above-captioned action will be dismissed without prejudice.

No Counsel entered an appearance on behalf of WRS on or before March 15, 2002. Despite the provisions of the second paragraph of the Order, no Order was entered dismissing the case. Rather, the docket was dormant until August 20, 2003 when Thomas E. Reilly, Esquire and Thomas E. Reilly, P.C. filed a Motion to Reopen the case.

From February 2002 through August 2003, WRS had engaged in negotiations with the NBOC and its successor PNC Bank. In Particular, the negotiation involved WRS desire to have the secured creditor waive any right in certain receivables including the Plaza receivable involved in this action. (See: copy of the Stipulation and Agreed Order Approving Settlement attached hereto) proposed settlement agreement letter attached hereto). Ultimately, PNC Bank agreed to waive its rights in all but some receivables thus giving WRS the right to the proceeds of any recovery. This framework was in place, but unapproved by the Bankruptcy court in August of 2003.

In August 2003, with the PNC Bank settlement underway, WRS had the right to receive the proceeds of any recovery and the prospective ability to offer a contingent fee arrangement to Thomas E. Reilly. On that basis, Thomas E. Reilly and WRS entered into a retention agreement and WRS moved to retain Thomas E. Reilly, Esquire and Thomas E. Reilly, P.C. as special Counsel pursuant to 11 U.S.C. §327 (e) to represent WRS in various matters including the case that was the subject of the Court's Order of February 14, 2002. At the same time and in anticipation of the approval of his retention and at the direction of WRS bankruptcy counsel Thomas E. Reilly moved the court to reopen the within case based upon the first Paragraph of the Order of February 14, 2002. By Memorandum Order of September 15, 2003, the District Court denied the request to reopen stating that the case was "dismissed without prejudice and therefore, if WRS wishes to pursue the claims its October 13, 2000 Complaint, WRS must file a new action against the Defendants." Following the appeal of the September 15, 2003 Order and the Third Circuits remand, the WRS Motion to Reopen the case is again before the Court.

ARGUMENT

In the appeal, the Third Circuit recognized that the February 14, 2002 Order constituted an administrative closing Order. WRS v. Plaza Entm't, Inc., 404 F.3rd 424 (3rd Cir. 2005). The Circuit Court recognized that the effect of such an order was to remove the case from the District Court's Active Docket. The Order did not substantively affect the case.

Penn West Assoc's, Inc. v. Cohen, 371 F.3d 118 (3rd Cir. 2004). Rather it essentially stayed the proceeding pending reactivation by one of the parties or the Court. Lehman v. Revolution Portfolio LLC, 166 F.3d 389, 392 (1st Cir. 1999). Granted, the Court indicated that if Counsel did not enter an appearance for WRS within 30 days of February 14, 2002, the case would be dismissed without prejudice, but the case was never dismissed and counsel has now appeared for WRS. In fact the Third Circuit determined that it lacked jurisdiction because no final order had been entered terminating the case, so the Order was not self-executing and operated only to administratively close the case.

The Third Circuit also recognized that because no final Order was entered, WRS does not have to establish "extraordinary cause" for the Court to grant its request to reopen the administratively closed case. Rather, WRS submits that under the February 14, 2002 Order it should be sufficient that WRS finds further proceedings desirable. Most cases dealing with administrative closing Orders are closed because of a pending settlement of the litigation. Here, WRS counsel withdrew because of he had not been appointed by the Bankruptcy Court to act as special counsel. As described above, the delay in appointment had to do with issues between WRS and its secured creditor concerning which was entitled to prosecute actions to recover receivables and which would benefit from a recovery.

In Bankruptcy, the debtor in possession has the power to continue prosecute pre-petition under B.R. C P. 6004 and 11 U.S. C. 704. However, the Debtor in possession cannot prosecute claims belonging to third parties. In Re Rare Coin Galleries, Inc. 862 F.2d 892 (1st. Cir. 1988). Following the WRS receivership proceedings, the National Bank of Canada (NBOC) took control of WRS assets in which it had a perfected security interest. Following the WRS bankruptcy petition, NBOC, and then its successor PNC Bank, controlled the claim against Plaza and its guarantors. It was not until the finalization of the WRS settlement with PNC Bank that WRS had the right as debtor in possession to continue the Plaza litigation. This limited WRS's ability to engage Counsel because it was not clear whether WRS continued to own the claim following NBOC's actions and WRS could not promise to compensate counsel with funds earmarked as the collateral of PNC Bank. However, once that issue was resolved and the Plaza receivable was retained by WRS free of the security interest, WRS retained counsel and moved to reopen the case.

Counsel for WRS has not found cases describing the factors to be considered by the Court when addressing a Motion to Reopen an administratively closed case. In footnote 5 of its opinion remanding the within case, the Third Circuit, suggested that the Court consider that,

> [T]he statute of limitations has run, the ambiguity of the February 14 order, the unlikelihood that WRS would have knowingly forfeited its $ 1.2 million claim, the policy underlying 11 U.S.C. § 108, which gives debtors a two-year extension within which to commence an action on a pre-petition claim, which courts have construed as designed to provide extra time "'to investigate and pursue collection of claims for the benefit of the estate

WRS submits that consideration of these factors demonstrates that the within case should be reopened.

First, in the "new case" at Docket 03-1398, Defendants immediately asserted by Motion to Dismiss, that WRS claim was barred by the applicable statute of limitations. Although the Motions were denied, the applicability of the Statute of limitations as a defense remains in the new case but was not is an issue in the first case. Thus the Court, by initially refusing WRS' motion to reopen and requiring a new action, prejudiced WRS. If the within action is not reopened, WRS will have to address a Defense that was unavailable to the Defendants in the within action.

WRS submits that it is fundamentally unfair to subject it to Defenses that have arisen by the passage of time while the within case was dormant based upon paragraph 1 of the February 14, 2002, especially when Defendants took no action during the dormancy to cause an adjudication on the merits. The Court should recognize that its order of February 14, 2002 gave the Defendants an equal opportunity to resume the litigation and defend against the asserted liability. The automatic stay did not operate to limit their ability to do so. Maritime Electric Company v. United Jersey Bank, 959 F.2d 1194 (3rd Cir. 1991) vacated, reh'g granted, 1992 U.S. App. LEXIS 348 (3d Cir.), reinstated, 1992 US.Apps Lexis 5144, 22 Bankr. Ct. Dec. (LRP) 1309 (3d Cir. 1992). Although WRS could have requested a stay of the within proceedings in the Bankruptcy Court, in light of the February 14, 2002 Order, and the absence of any actual dismissal, WRS had no incentive to request such a stay because the February 14, 2002 Order had apparently the effect of a stay until one of the parties sought to resume the litigation. Thus, the apparent "stay" of the within case by Paragraph 1 of the February 14, 2002, Order, induced WRS to believe it could reactivate the case at any time without concern for an expiring statute of Limitations. WRS submits that it would be inequitable for the court to refuse to reopen which would be tantamount to giving the Defendants a new affirmative defense.

Secondly, WRS submits that the ambiguity of the February 14, 2002 as recognized by the Third Circuit, should not prejudice it in the pursuit of this claim. That Order expressly stated "[S]hould further proceedings therein become necessary or desirable, any party may initiate the same in the same manner as if this Order had not been entered." The Court prefaced this phrase, with an acknowledgement that because of the WRS' Chapter 11 Bankruptcy, "no further action can be taken at this time." Thus, it was not only the absence of counsel for WRS that concerned the Court but also the impact on the WRS' Bankruptcy and its ability to proceed at that time with the litigation. Furthermore, Court clearly understood that some further action could become necessary or desirable in the future. Significantly, the Court imposed no time limit on the resumption of the litigation under paragraph 1 of the Order of February 14, 2002.

WRS's Bankruptcy did impose several legal impediments to immediately fully litigating the case. First, the counterclaim asserted by Plaza Entertainment, Inc. was stayed by the Automatic Stay arising under 11 U.S.C. §362. Action Drug Co., Inc. v. Overnite Transportation Co., 724, F. Supp. 269, 278 (D. Del. 1989). Also, WRS was required by 11 U.S.C. §327 to have the Bankruptcy Court approve counsel in order for that counsel to have any right to receive compensation for representing the WRS. Ferrara & Hantman v. Alvarez (In re Engel), 124 F.3d 567 (3rd Cir. 1997). This raised the issue of whether NBOC or WRS had the right to pursue the claim and to contract with Counsel for a contingent fee. Clearly, WRS pursued a resolution of this issue as demonstrated by the attached letter of settlement and the Order ultimately approving the settlement. With this background, it was reasonable for WRS to have understood the February 14, 2002 Order as staying the proceedings until any one of the Parties desired to resume the litigation and that its lack of counsel would not impair the ability to resume the case when desirable.

WRS submits when both paragraphs of the February 14, 2002 Order are read together, the reasonable interpretation is that the Order would not dispose of WRS' case on the merits, so that its dormancy could not be asserted as a defense should WRS desire to initiate further proceedings to resume the case. That is how WRS understood it and why upon resolving the issue of its right to pursue the receivable, it moved to reopen. Requiring WRS to pursue the "new" action, rather than reopening the within case will essentially allow the dormancy of the within action to prejudice WRS substantive rights which was clearly not intended by the February 14, 2002.

Thirdly, as can be seen form the settlement with PNC Bank, WRS had no intention of abandoning this claim. The delay in pursuing it resulted not from inattention or lack of desire to proceed but from a genuine dispute over whether WRS had the right to continue the action following the actions of NBOC, then PNC Bank, to enforce its security interest in all WRS receivables. WRS moved to reopen the case for its benefit and the benefit of its unsecured creditors. It is not only WRS that will be prejudiced if the court refuses to reopen the case.

Finally, WRS submits that reopening the within case is consistent with the policy behind 11 U.S.C. § 108(a). As the Third Circuit said, section 108 (a) extends for two years the time within which the trustee or debtor in possession has to commence an action on a pre-petition cause of action. The purpose of that extension is to give the trustee or the Debtor in possession time to investigate and pursue collection of claims for the benefit of the estate. While the section does not extend the post petition time period for Counsel's appearance set by the Court in Paragraph 2 of the February 14, 2002 Order, the section does address when suit can be commenced on pre-petition claims. It is therefore instructive as to why the Court should reopen the case now rather than dismiss the case because no counsel appeared with in 30 days of February 14, 2002.

It is clear that during the time that the within case was administratively closed, WRS as debtor in possession was doing precisely what was anticipated by section 108 (a) with respect to the claim against Plaza embodied in this case. Following the commencement of the Bankruptcy, WRS was evaluating its ability to pursue the claim, the benefit of pursuing the collection of the claim and ultimately securing the right to pursue the claim against Plaza and its guarantors. Thus the "stay" of the within action created by the administrative order, provided WRS with the time to clarify its right to continue with this case. Once WRS resolved the issue, it moved to reopen this case to move forward with its efforts to recover the receivable from Plaza and its guarantors. It did so by filing the Motion to Reopen within two years of the commencement of the Bankruptcy. This is exactly what section 108(a) contemplates with respect to pre-petition claims.

As pointed out by the Third Circuit, Defendants assert that section 108 (a) does not apply to actions pending when Bankruptcy is commenced. As pointed out above, 11 U.S.C. §704 and B.R.C.P 6004 combine to allow the Debtor in possession to pursue its pre-petition litigation. Under Maritime Electric Company, supra. the automatic stay did not hamper the Defendants from defending. Eisinger v. Way (In re Way), 229 B.R. 11 (BAP 9th Cir. 1998). Clearly, Defendants had every opportunity to resume the litigation as provided in the February 14, 2002 Order but apparently chose to do nothing.

It seems disingenuous that defendants would argue that the purpose of section 108(a) is not served by reopening the case. Had the within case been dismissed without prejudice, section 108(a) would have enabled WRS to commence the action within two years as a pre-petition claim. It did not do this because it believed that under paragraph 1 of the February 14, 2002 Order it could resume its litigation when it became desirable. In fact, WRS filed its Motion to Reopen within two years August 24, 2001 when it commenced its Bankruptcy. However, since the case was not dismissed Defendants seem to argue that section 108(a) does not permit the court to simply reopen the dormant case. The result would be to prejudice WRS despite its efforts to resolve the bankruptcy issues related to the right to pursue the claim in favor of Defendants who could have moved the litigation forward but did not. WRS submits that such a result would be inequitable.

Finally, the Third Circuit indicated that its decision that, " Nothing in the opinion is intended to preclude the District Court from dismissing the case because counsel failed to comply with the requirements of the order to enter an appearance." WRS never understood the Order of February 14, 2002 to be a sanction against WRS or its counsel. In that respect, since WRS had no Counsel, other than Bankruptcy Counsel, following present Counsel's withdrawl, no counsel "failed to enter an appearance" because no counsel had been retained as required by 11 U.S.C. §327. Rather, as pointed out above, WRS was not even sure it had the right to pursue the claim during the time the Court imposed the appearance requirement. Therefore, despite the indication form the Third Circuit, WRS submits that the Court should not at this time refuse to reopen the case because "counsel failed to enter an appearance."

In conclusion, consideration of the factors delineated by the Third Circuit, should lead the Court to the conclusion that the equities are served only by reopening the within case. Defendants will suffer no detriment by resuming this litigation since until now they took no action to bring about a more timely resolution. Discovery has been pursued although it is not complete. In fact the case is further along than the "new"case. For these reason, WRS respectfully requests that the Court grant its Motion to Reopen the within administratively closed case.

Respectfully submitted,

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BY:________________________

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